

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN WESLEY GRAY)	
)	
Petitioner)	
)	
v.)	Civil No. 01-19-B-S
)	
MAINE ATTORNEY GENERAL)	
)	
Respondent)	

***RECOMMENDED DECISION ON
PETITION FOR WRIT OF HABEAS CORPUS***

Petitioner, John Gray, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 29, 2001. (Docket No. 1) Respondent, the Attorney General for the State of Maine, was ordered to answer. (Docket No. 2.) The Attorney General has responded with a motion to dismiss. (Docket No. 3.) Subsequently, Gray filed a second § 2254 petition (Docket No. 4) that this court construes as an amended petition. After review of all these submissions I recommend that the petition be **DISMISSED**.

Factual Background

Gray pleaded guilty on November 1, 1999, to a charge of vehicular manslaughter. On December 1, 1999, he was sentenced to twelve years of imprisonment with all but six of those years suspended. During this hearing the court attributed to Gray a trio of operating after suspension convictions that were in truth convictions of the manslaughter victim. This was a misstep that went unchecked by the parties during the hearing.

Gray filed an application to allow an appeal of his sentence on December 9, 1999. The Sentence Review Panel for the Supreme Judicial Court denied Gray leave to appeal the sentence on February 24, 2000. Gray did not file a direct appeal of his conviction.

However, on February 29, 2000, Gray did file a motion pursuant to Maine Rules of Criminal Procedure 35 seeking to reopen his sentencing because of the mix-up over Gray's and the victim's driving records. The superior court issued an order denying this motion, which was entered on April 7, 2000. It stated that the absence of the three operating under suspension convictions "would not alter the sentence imposed by the court given the significant facts of the tragic accident caused by the defendant tested at .24 BAC after the accident. Additionally, the medical records revealed a long history of substance abuse, coupled with a significant criminal history in the mid-1970s." (Order Apr. 7, 2000.)

On April 28, 2000, Gray filed a notice of appeal of this order to the Maine Supreme Judicial Court sitting as the Law Court. In his memorandum supporting this appeal Gray, through counsel, restated his challenge to his sentence, citing the mistake of fact, and seeking a resentencing so that Gray could "be accorded the full due process of law to which he is entitled." (Def's Mem. May 22, 2000.) The Law Court denied Gray a certificate of probable cause to proceed with the appeal on June 7, 2000.

After filing his initial habeas petition in this court and after the State filed its motion to dismiss, Gray filed a motion for post conviction review pursuant to Maine Rule of Criminal Procedure 66 and 15 M.R.S.A. § 2121 et seq. According to Gray's amended § 2254 petition he filed this motion on March 27, 2001, believing it to be timely because of the Attorney General's representation in its motion to

dismiss the § 2254 petition that Gray had until March 30, 2001, to file this motion with the court (and thus had not exhausted his claim).¹ To Gray's chagrin, the superior court entered a summary dismissal order concluding that Gray's motion was time barred because it was filed after the running of the one-year limitation period contained in 15 M.R.S.A. § 2128(5). The court described the one-year period as running from December 21, 1999, the date that Gray's time for taking a direct appeal of his conviction elapsed. The superior court's order was entered on April 4, 2001.

Discussion

I recommended that Gray's § 2254 petition be dismissed because he has not yet exhausted all of his claims. Section 2254(b)(1) provides that the court cannot grant a petition for habeas corpus unless the state prisoner has "exhausted the remedies available in the courts of the [s]tate" § 2254(b)(1).

Failure to exhaust one of multiple claims prevents the federal court from entertaining the habeas petition. See Adelson v. Dipaola, 131 F.3d 259, 261 (1st Cir. 1997)("[A] federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained in the application.").

Gray's motion for post-conviction review was denied as untimely by the superior court on April 4, 2001. Under Rule 76 of the Maine Rules of Criminal Procedure, Gray has twenty days from the entry of that judgment on the docket to appeal this determination to the Law Court. Me. R. Crim. P.

¹ In the amended petition Gray raised a third ground for relief not contained in his initial petition. He argues that this misrepresentation by the Attorney General vis -à-vis the expiration of the limitation period on his post-conviction review amounts to ineffective assistance of counsel. I did not require the Attorney General to answer or to supplement its motion to dismiss in light of this additional ground because it is not a tenable claim. First, The Attorney General is not Gray's counsel. Second, even if the attorney owed some duty to Gray, this alleged misrepresentation was qualified and not an absolute representation. Third, § 2254 expressly provides that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." § 2254(i).

76(c). That rule also provides that “upon a showing of excusable neglect, the assigned justice may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed.” Id. Therefore, to the extent that Gray’s post-conviction challenge relates to his § 2254 claims he has not yet exhausted them.

Though the Attorney General’s motion to dismiss was filed prior to Gray’s amendment to his petition identifying the posture of Gray’s efforts to file his post-conviction review, this recommendation accords with the Attorney General’s position in its motion to dismiss. The Attorney General argues that Gray’s second ground, an ineffective assistance of counsel claim based on his attorney’s allegedly deficient performance at the sentencing, has not been exhausted via pursuit of state post-conviction review.² The State took the position that the filing of Gray’s Rule 35 motion on March 30, 2000, tolled the running of the § 2128(5) limitation period during the pendency of that action. It perceived that Gray had until March 30, 2001 to file his motion, though it did qualify this representation with the clause, “[a]ssuming the State’s calculations are correct.” What is more, as the State points out, the Law Court has concluded that the subsection (5) limitation is not jurisdictional, but rather that the “subject matter jurisdiction of courts hearing petitions for post-conviction review is governed by section 2124, not section 2128.” Diep v. State of Me., 2000 ME 53, ¶5, 748 A.2d 974, 976 (concluding that the

² The Attorney General asserts that Gray’s first claim has been procedurally defaulted since he did not and cannot now raise the federal constitutional issue in the state courts. In the memorandum supporting the Rule 35 motion, Gray does twice state that he seeks resentencing to assure that his “due process” rights are protected. Whether or not this adequately presented the federal question to the state courts is not black-and-white. See Martens v. Shannon, 836 F.2d 715, 717 (1st Cir. 1988)(“The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory might be lurking in the woodwork will not turn the trick.”) This is a bridge that we cannot cross today, but it is also a bridge that is not burned by dismissing this petition by Gray for failure to exhaust his state court remedies.

superior court's summary dismissal of the petition for post-conviction review was not justified on the grounds that the petitioner failed to state a claim because the petition was not filed within the § 2128(5) time-frame).

Conclusion

It appears that Gray can still challenge the superior court's summary dismissal of his motion for post conviction review and that, as a result, Gray has not yet fully exhausted his opportunities for state court relief as required by § 2254(b)(1)(A). For this reason, I hereby recommend that the petition for writ of habeas corpus be **DISMISSED** for failure to exhaust state court remedies.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

April 26, 2001.

Margaret J. Kravchuk
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-19

GRAY v. ATTORNEY GENERAL, ME

Filed: 01/29/01

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

JOHN WESLEY GRAY

JOHN WESLEY GRAY

plaintiff

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